UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ASHBRITT, INC.,

Plaintiff,

v.

MARK GHILARDUCCI, et al.,

Defendants.

Case No. 20-cv-04612-JSC

ORDER RE: MOTION TO DISMISS SECOND AMENDED COMPLAINT

Re: Dkt. No. 22

AshBritt Inc. ("Plaintiff") brings a Section 1983 action against Mark Ghilarducci and Ken DaRosa (collectively, "Defendants") alleging violation of its First Amendment rights, California procurement law, and Federal Rule of Civil Procedure 57. Defendants' motion to dismiss Plaintiff's Second Amended Complaint is now pending before the Court.[1] (Dkt. No. 22.) After carefully considering the amended complaint and the parties' written submissions, the Court concludes that oral argument is not necessary, *see* N.D. Cal. Civ. L.R. 7-1(b), VACATES the December 17, 2020 hearing, and GRANTS in part and DENIES in part in the motion to dismiss. Plaintiff has adequately alleged standing, but the first claim for damages based on violation of Plaintiff's First Amendment rights is dismissed for failure to state a claim, and the second and third claims for declaratory relief are barred by the Eleventh Amendment.

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[1] All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. Section 636(c). (Dkt. Nos. 8 and 11.)

BACKGROUND

A. Second Amended Complaint Allegations

Plaintiff is a Florida Corporation engaged in the business of disaster recovery and response services. (Dkt. No. 21, Second Amended Complaint ("SAC") at ¶ 5.[2]) Mr. Ghilarducci is the Director of California Governor's Office of Emergency Services ("OES"), and Mr. DaRosa is the Acting Director of the California Department of Resources Recycling and Recovery ("CalRecycle"). (*Id*. at ¶¶ 6-7.)

CalRecycle engaged Plaintiff to perform cleanup services in Lake County in 2015. (*Id*. at ¶ 17.) During a conference call with Mr. Ghilarducci, Plaintiff's Chairman of the Board, Randy Perkins, criticized the way the state paid its contractors. (*Id*.) In a subsequent call, Mr. Ghilarducci stated that he would ensure, to the best of his ability, that Plaintiff would not work in the state of California. (*Id*.) Plaintiff contends that since Mr. Ghilarducci's statement, CalRecycle has rejected all of Plaintiff's bids to work on debris removal projects. (*Id*. at ¶ 18.)

In May 2020, OES gave CalRecycle the authority to manage a tree removal, transport, and disposition project in Butte County. (*Id*. at ¶ 11-12.) CalRecycle issued an invitation for independent contractors to submit bids to work on the project. (*Id*. at ¶11.) This invitation included a "California Only Restriction" which limits eligibility for bid acceptance to local and California-based corporations. (*Id*. at ¶ 13.) AshBritt "would have submitted a bid, sought to perform work on the contract, and performed such work, had it not been ineligible under the 'California Only Restriction.'" (*Id*. at ¶ 14.) AshBritt has "challenged the 'California Only Restriction' by questioning its validity in inquiries to CalRecycle." (*Id*. at ¶ 15.) It believes that the "California Only Restriction" has been implemented to exclude Plaintiff from bidding on the project. (*Id*. at ¶ 16.)

B. Procedural Background

Plaintiff filed the complaint in this action on July 10, 2020. (Dkt. No. 1.) Three days later, Plaintiff filed its First Amended Complaint which alleged two claims for relief: (1) violation of 42 U.S.C. § 1983 and the Privileges and Immunities Clause of Article IV of the Constitution, *see* U.S.

[2] Record Citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the document.

Const. art. IV, § 2, cl. 1.; and (2) for declaratory relief. The Court granted Defendants' motion to dismiss Plaintiff's Privileges and Immunities Clause claim. (Dkt. No. 20.) Plaintiff thereafter filed the now-operative SAC which includes two Section 1983 claims seeking damages and declaratory relief based on violation of AshBritt's First Amendment Rights, and a claim seeking declaratory relief under "California Procurement Statutes and Decisional Law and Federal Rule of Civil Procedure 57." (Dkt. No. 21.) Defendants responded by filing the now pending motion to dismiss.

DISCUSSION

Defendants move to dismiss the SAC contending that (1) Plaintiff lacks standing because it cannot allege that it has been injured; (2) the Eleventh Amendment bars the request for declaratory relief, and (3) Plaintiff cannot state a claim for First Amendment retaliation.

A. Standing

"Standing is a necessary element of federal-court jurisdiction" and a "threshold question in every federal case." *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Article III standing consists of three "irreducible constitutional minimum" requirements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These elements are often referred to as injury in fact, causation, and redressability. *See, e.g., Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020). Plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the existence of Article III standing and, at the pleading stage, "must clearly [ ] allege facts demonstrating each element." *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks and citation omitted); *see also Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983) ("The facts to show standing must be clearly apparent on the face of the complaint.").

An injury in fact is "an invasion of a legally protected interest" that is (1) "concrete," (2) "particularized," and (3) "actual or imminent, not conjectural or hypothetical." *Spokeo,* 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). To be "particularized," an

injury "must affect the plaintiff in a personal and individual way," while "concreteness" requires an injury to be "'de facto'; that is, it must actually exist." *Id*. at 1548 (internal citation omitted). The requirement that an injury be "actual or imminent" "ensure[s] that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Further, there must be a sufficient "causal connection between the injury and the conduct complained of." *United States v. Hays*, 515 U.S. 737, 743 (1995).

Defendants insist that Plaintiff lacks standing because (1) it cannot demonstrate an injury because it never applied for the bid with the California Only Restriction, and (2) it cannot allege that it would have obtained the bid, if it had applied. Plaintiff counters that it need not have submitted a bid because it would have been futile to do so and it is not required to show that it would have been awarded the bid to establish standing.

"[S]tanding does not require exercises in futility." *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir.2002). Courts do not require plaintiffs to submit a formal application where the challenged policy or ordinance unambiguously rendered an application futile. *See, e.g., id*. at 950 ("the [challenged] statute unambiguously precludes Taniguchi, as [a lawful permanent resident] convicted of an aggravated felony, from the discretionary waiver. To apply for the waiver would have been futile on Taniguchi's part and, therefore, does not result in a lack of standing."); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir.1996) ("Applying for a permit would have been futile because: (1) the City brought state court actions against [the plaintiffs] to compel them to remove their signs; and (2) the ordinance flatly prohibited [the plaintiffs'] off-site signs[.]"); *see also Dragovich v. United States Dep't of the Treasury*, 764 F.Supp.2d 1178, 1185 (N.D. Cal. 2011) (holding that same sex couples were not required to submit an application for state-maintained long-term care insurance plan in order to establish standing where the government agency made abundantly clear in written and oral communications that their applications would be rejected and the relevant laws "plainly result" in the exclusion of same sex couples).

Defendants' argument that these cases and others like them are distinguishable because

they "concern the language and implementation of statutes, regulations, ordinances, and benefits programs—permanent or long-lasting provisions with a continuing impact on the rights of the broader public" is unpersuasive. (Dkt. No. 24 at 10:18-20.) Defendants do not cite any legal authority in support of their argument that futility only applies when a plaintiff is challenging a "statute, regulation, or ordinance" with "long-lasting provisions." Nor is Defendants' reliance on *Madsen v. Boise State Univ.*, 976 F.2d 1219 (9th Cir. 1992), availing. In *Madsen*, the court found that there were insufficient allegations to support a futility argument, noting in part that there were no "allegations that the University had an impenetrable policy—akin to a 'Whites Only' sign—which would have rendered it impervious to any efforts to educate it as to defects in its policies." *Id*. at 1222. Here, in contrast, there is an allegation of "an impenetrable policy." The SAC alleges:

> Under the provision entitled "California Only Restriction," the Solicitation limits eligibility to a "business or corporation whose principal office is located in California, and the owners, or officers if the entity is a corporation, are domiciled in California," or a "business or corporation that has a major office or manufacturing facility located in California and that has been licensed by the state on a continuous basis to conduct business within the state and has continuously employed California residents for work within the state during the three years prior to submitting a bid or proposal for a state contract." This restriction on eligibility applies to any entity that bids as a prime contractor, that performs work as a subcontractor and that is a member of a joint venture that seeks to perform Project works as either a prime or subcontractor.

(SAC at ¶ 13.) These allegations are sufficient to demonstrate that it would have been futile to apply here.

Likewise, Plaintiff's allegation that "[i]t would have submitted a bid, sought to perform work on the contract, and performed such work, had it not been ineligible under the 'California Only Restriction" (SAC at ¶ 14) is sufficient to demonstrate competitor standing. *See Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020) ("A plaintiff need not participate in the competition; the plaintiff need only demonstrate that it is 'able and ready to bid.' It is a plaintiff's ability and readiness to bid that ensures an injury-in-fact is concrete and particular; the requirement precludes the airing of generalized grievances.") (internal citations omitted).

McQuiston v. City of Los Angeles, 560 F. App'x 684, 685 (9th Cir. 2014), does not persuade the Court otherwise. In *McQuiston*, the court found no Article III injury because "McQuiston has never applied for a variance and, thus, has never been denied a variance. His alleged injury is therefore hypothetical, because he simply assumes he would not be granted a variance if he applied." Here, in contrast, Plaintiff has bid on projects and has even performed work on projects—it is not a stranger to the process.

Accordingly, Defendants' motion to dismiss based on lack of Article III standing is denied.

B. Eleventh Amendment Immunity

Next, Defendants contend that Plaintiff's declaratory relief claims are barred by the Eleventh Amendment. The Eleventh Amendment bars suits against States and state agencies in federal courts where the State has not waived its immunity. *Carmen v. San Francisco Unified Sch. Dist.*, 982 F. Supp. 1396, 1402 (N.D. Cal. 1997) aff'd, 237 F. 3d 1026 (9th Cir. 2001) (internal citations omitted). The State of California has not waived its immunity from Section 1983 lawsuits. *Dittman v. California*, 191 F.3d 1020, 1025-26 (9th Cir. 1999). The Eleventh Amendment bars suits against state agencies, as well as those where the state itself is named as a defendant. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 144 (1993). In addition, a plaintiff's suit "against state officials in their official capacities" is treated "as a suit against the state of California." *Holley v. California Dep't Of Corr*., 599 F.3d 1108, 1111 (9th Cir. 2010). "[A] suit 'against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). The Eleventh Amendment "does not, however, bar actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (citing *Ex Parte Young*, 209 U.S. 123, 155-56 (1908)).

There is no dispute that Plaintiff's second and third claims for declaratory relief are brought against state actors—Ghilarducci and DaRosa—in their official capacity. Thus, the claims are barred by the Eleventh Amendment unless *Ex Parte Young* applies. Plaintiff insists that *Ex Parte Young* applies because the First Amendment violation at issue here is continuing and not

"finally complete." (Dkt. No. 23 at 16:15.) In support of this argument, Plaintiff relies on a number of "facts"—none of which are alleged in the complaint. *Id*. at 16:18-20 (stating that the "status of the award to a bidder, the timing of payment and whether work has commenced, and whether it can be rescinded…all remain to be determined.") The SAC alleges that the deadline for the bid containing the California Only Restriction was July 20, 2020. (SAC at ¶ 12.) Further, Defendants allegedly relied on "emergency orders issued regarding the Camp Fire" to justify the restriction which supports an inference that the restriction is only being used for the bid on this project. (SAC at ¶ 32.)

"Whether the *Ex parte Young* doctrine applies in this case turns primarily upon one question: Is the relief the plaintiffs seek prospective, aimed at remedying an ongoing violation of federal law, or is it retrospective, aimed at remedying a past violation of the law?" *Cardenas v. Anzai*, 311 F.3d 929, 935 (9th Cir. 2002). Plaintiff's insistence that it seeks prospective relief because of the continuing nature of the harm is unsupported by the SAC's allegations. Plaintiff alleges that Defendants included the California-Only Restriction in the bid for the Camp Fire clean-up project in retaliation for statements Mr. Perkins made in violation of Plaintiff's First Amendment rights, and that the bid on the project has closed. These allegations do not support a plausible inference of an ongoing violation of federal law. Accordingly, the Eleventh Amendment bars Plaintiff's second claim for declaratory relief based on violation of its First Amendment rights.

The Eleventh Amendment likewise bars Plaintiff's third claim for declaratory relief based on violations of "California Procurement Statutes and Decisional Law." The *Ex Parte Young* exception does not apply to state law claims. *See Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 268 (2011); *see also Doe v. Regents of the Univ. of California*, 891 F.3d 1147, 1153 (9th Cir. 2018) ("the *Young* exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant.")

Accordingly, Plaintiff's second and third claims for declaratory relief are dismissed as barred by the Eleventh Amendment. The third claim is dismissed without leave to amend as *Ex*

Parte Young does not apply as a matter of law. The second claim is dismissed with leave to amend, but only if Plaintiff in good faith can plead facts sufficient to plausibly support an inference of a prospective violation.

C. First Amendment Retaliation

Finally, Defendants move to dismiss Plaintiff's First Amendment retaliation claim for failure to state a claim. Plaintiff insists that Defendants have waived this argument by failing to make it in its initial motion to dismiss. Federal Rules of Civil Procedure 12(g)(2) technically prohibits successive motions to dismiss raising arguments that could have been made in a prior motion. Fed. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."). However, as the Ninth Circuit has observed:

> [w]e read Rule 12(g)(2) in light of the general policy of the Federal Rules of Civil Procedure, expressed in Rule 1. That rule directs that the Federal Rules 'be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.' Fed. R. Civ. P. 1. Denying late-filed Rule 12(b)(6) motions and relegating defendants to the three procedural avenues specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1.

In re Apple iPhone Antitrust Litig., 846 F.3d 313, 318 (9th Cir. 2017), aff'd sub nom. *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019). The Court thus exercises its discretion here "to consider the new arguments in the interests of judicial economy," rather than requiring Defendants to file a Rule 12(c) motion. *See Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. C 10-05696 CRB, 2011 WL 2690437, at *2 (N.D. Cal. July 8, 2011).

To state a First Amendment retaliation claim, a plaintiff must show "that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016) (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006)). To ultimately "prevail on such a claim, a plaintiff must establish a 'causal connection'

between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" *Nieves v. Bartlett*, —— U.S. ——, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman* v. Moore, 547 U.S. 250, 259 (2006)). In particular, a plaintiff must show that the defendant's retaliatory animus was "a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Id*. (quoting *Hartman*, 547 U.S. at 260).

Defendants insist that Plaintiff's First Amendment retaliation claim fails because (1) the allegations do not plausibly suggest retaliation; and (2) Plaintiff has not alleged an injury proximately caused by the California-Only Restriction. The Court addresses each argument in turn.

First, there is no dispute that Plaintiff engaged in a constitutionally protected activity when Mr. Perkins "pointedly criticized the wasteful and inefficient basis on which the State was paying its contractors." (SAC at ¶ 17.) The issue is whether Plaintiff has plausibly alleged a connection between this event in 2015 and CalRecycle's decision five years later to include the California-Only Restriction with the Camp Firm cleanup solicitation and whether Plaintiff has plausibly alleged any connection between this protected activity and Defendant DaRosa. While "timing can properly be considered as circumstantial evidence of retaliatory intent," *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995), there is no rule requiring a certain temporal proximity. In fact, the Ninth Circuit "caution[s] that a specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic." *Coszalter v. City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003). However, the time period at issue in *Coszalter* was three to eight months. Plaintiff has not identified any case where the retaliatory motive was based on conduct five years prior. In *Addison v. City of Baker City*, 258 F. Supp. 3d 1207, 1222 (D. Or. 2017), aff'd, 758 F. App'x 582 (9th Cir. 2018), on which Plaintiff relies, the allegedly retaliatory conduct began shortly after the protected activity although the primary retaliatory conduct challenged occurred later because that was the conduct within the statute of limitations period.

Plaintiff also insists that the allegations that since 2015 it has bid on other recovery and debris removal projects, but it has been rejected on each occasion, support an inference of

retaliation. (SAC at ¶ 18.) In addition, Plaintiff suggests that the reason offered for the California-Only Restriction—invocation of an emergency proclamation and executive order by former Governor Brown which suspended the application of California procurement law—is pretextual because the removal and cleanup for the Camp Fire was completed by November 2019. (*Id*. at ¶ 15.) The latter argument does not make sense as the at-issue project was for "a project entitled 'Tree Removal Services for the Camp Fire in Butte County'" (*id*. at ¶ 11); in other words, Plaintiff itself alleges the project was for the Camp Fire so to accept Plaintiff's argument would mean the entire project was a pretext. It does not take that position.

With respect to Plaintiff's contention that its allegation that it has unsuccessfully bid on other projects since 2015 demonstrates ongoing retaliation, the Court is not persuaded. Plaintiff has not alleged any facts which suggest that the motive for rejecting Plaintiff's bids for the other projects was retaliation. Nor has Plaintiff alleged any facts regarding those losing bids such as when the bids were submitted, how many unsuccessful bids were submitted, and other facts from which the Court could infer a retaliatory motive for the rejection of Plaintiff's bids. As currently pled, there are a number of equally plausible explanations for the rejection of the other bids such as—as Defendants' suggest—that Plaintiff did not submit the lowest bid. *See Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (finding that where there is an "obvious alternative explanation" asking "us to infer, discrimination is not a plausible conclusion.") (internal citation omitted).

Further, beyond alleging that Defendant DaRosa "had responsibility for developing or approving the government contract solicitation that is the subject of this action, and has authority over its terms and provisions," Plaintiff has not alleged any connection between DaRosa and the alleged protected activity or retaliatory action. (SAC at ¶ 7.) To the extent that Plaintiff seeks to proceed on an integral participation theory, while the integral participation standard "does not require that each [defendant's] actions themselves rise to the level of a constitutional violation, [ ] it does require some fundamental involvement in the conduct that allegedly caused the violation." *Blankenhorn v. City of Orange*, 485 F.3d 463, 492 n.12 (9th Cir. 2007) (citing *Boyd v. Benton Cnty*., 374 F.3d 773, 780 (9th Cir. 2004)). Plaintiff's allegations do not plausibly suggest that DaRosa was fundamentally involved here.

Second, Plaintiff has likewise not alleged an injury that was plausibly proximately caused by the alleged retaliatory conduct here. "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must cause the injury." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). Plaintiff does not allege facts that plausibly support an inference that the retaliatory motive caused the injury alleged—"financial loss" (SAC at ¶ 23)—as there are no allegations to support the inference that Plaintiff would have been awarded the bid but-for the retaliatory motive. The conclusion that Plaintiff has adequately alleged an injury for purposes of Article III standing, but not for purposes of stating a plausible retaliation claim, is not inconsistent with this conclusion. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). "*Twombly* and *Iqbal* are ill-suited to application in the constitutional standing context because in determining whether plaintiff states a claim under 12(b)(6), the court necessarily assesses the merits of plaintiff's case." *Id.* In contrast, "the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim." *Id.* "The jurisdictional question of standing precedes, and does not require, analysis of the merits." *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189 n. 10 (9th Cir. 2008). As discussed *supra*, Plaintiff's allegation of injury fails under the *Iqbal/Twombly* standard.

Accordingly, Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim is granted. This dismissal is with leave to amend to the extent that Plaintiff has a good faith basis for alleging additional facts necessary to plead a First Amendment retaliation claim consistent with this Order.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART. Plaintiff's first claim for damages based on violation of his First Amendment rights is dismissed for failure to state a claim with leave to amend. Its second and third claims for declaratory relief are barred by the Eleventh Amendment and therefore dismissed. Leave to amend as to the second is granted, but denied as to the third.

An amended complaint, if any, shall be filed by January 7, 2021.

The Court resets the Initial Case Management Conference for February 18, 2021 at 1:30

p.m.

This Order disposes of Docket No. 22.

IT IS SO ORDERED.

Dated: December 16, 2020

JACQUELINE SCOTT CORLEY
United States Magistrate Judge